



**Small Business Economic Impact Statement for
Amendment to Chapter 173-503 WAC
Instream Resources Protection Program-Lower And
Upper Skagit Water Resources Inventory Area
(WRIA 3 And 4)**

Department of Ecology

**February 2005
05-11-004**

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(WRIA 3 And 4)

Prepared by:

Washington State Department of Ecology

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BACKGROUND

The Washington State Department of Ecology's (Ecology) Water Resources Program is proposing to amend an instream resources protection and water resources program for the Skagit River basin to:

- Retain perennial rivers, streams, and lakes in the Lower and Upper Skagit River basin with instream flows and levels necessary to protect and preserve instream values, and instream flows. Closures are proposed for specific water sources.
- Provide for an adequate and safe supply of potable water to satisfy the domestic needs of households and small businesses and for stockwatering via the establishment of two reservations of water.
- Clarify Ecology's policies to guide the protection, utilization and management of Skagit River basin surface water and interrelated groundwater resources for use in future water allocation decisions.

The Skagit River Basin is designated as Water Resource Inventory Areas 3 and 4 (WRIA 3 & 4) in chapter 173-500 Washington Administrative Code (WAC). The existing rule is chapter 173-503 WAC. Ecology is developing and issuing this Small Business Economic Impact Statement (SBEIS) as part of its rule adoption process. It is not legally resolved if an SBEIS is required for this rulemaking pursuant to chapter 19.85 RCW. However, Ecology elected to perform a SBEIS and will use the information developed in the SBEIS to ensure that the proposed rule is consistent with legislative policy. Moreover, the existing rule has been challenged in *Skagit County v. Washington State Department of Ecology* based, at least in part, on the fact that an SBEIS was not completed during the original rulemaking. Ecology recognizes that conducting a SBEIS is a faster and more cost-effective approach as part of this rulemaking amendment than continuing litigation over whether a SBEIS was or is necessary.

DESCRIPTION AND PURPOSE OF THE SBEIS

The objective of this SBEIS is to identify and evaluate the various requirements and costs that the proposed rule might impose on business. In particular, the SBEIS examines whether the costs on businesses that might be imposed by the proposed rule impose a disproportionate impact on the State's small businesses. Through this examination, Ecology also examines the expected impacts from the existing instream flows that remain in this rule. The specific purpose/required contents of the SBEIS is in RCW 19.85.040.

1. DISCUSSION OF COMPLIANCE COSTS FOR WRIA 3&4 BUSINESSES

INTRODUCTION

Existing chapter 173-503 WAC Instream Resources Protection Program – Lower and Upper Skagit Water Resources Inventory Area (WRIA 3 and 4) is the subject of this rule amendment. The evaluation of the impacts of the proposed rule is based on analysis and comparison of water right management before and after the effective date of the rule. The current water right administration is based on an extensive and complex legal and administrative framework and existing Chapter 173-503 WAC. The framework includes instream flows, administrative procedures for applications for both new water rights and changes to existing water rights, and the use of water by permit-exempt wells (RCW 90.44.050). Implementation of Chapter 90.22 RCW and Chapter 90.54 RCW are also part of this legal baseline. In proposing reservations of water, and closing certain tributary basins, the rule amendment creates new conditions that must be considered when making future water right decisions. A brief description of compliance requirements is provided below. A detailed description of water management under the existing and proposed rules can be found in Appendix B.

WATER RIGHT ADMINISTRATION UNDER THE RULE

The proposed future water right management program will establish tributary subbasins and reserve specific quantities of groundwater in each subbasin, for the year-round future domestic uses of households and businesses. The rule also closes certain tributary basins to future appropriations, sets a reservation for future stockwatering and establishes eligibility conditions for use of the reservations. Expected impacts to water management include the following:

Surface Water: For basins not subject to closures, the decision process will be the same as prior to the rule amendment. Ecology will condition a water right in such a way that flows are protected and a permit would be approved granting an interruptible right. Under the proposed rule, all new surface water rights, that do not use the reservations as their source, will continue to be “junior” to the instream flow levels in the rule and will be required to stop withdrawing water when minimum flows are not met in the surface water source. In general, this is not likely to represent a significant change for future proposed surface water withdrawals.

Applications for new consumptive surface water rights from closed sources would be denied, unless the applicant proposes, and Ecology accepts, mitigation of the water use. If the basin is closed for an entire year, then mitigation is possible but generally not practical. The use may also be approved if it is “clear that overriding considerations of the public interest will be served.” (RCW 90.54.020(3)(a)).¹ For areas currently administratively closed under Ecology’s Surface Water Source Limitations (SWSL) list, this would represent no change from the current situation. For areas that are not currently closed, this may represent a change because applications for new surface water rights would be denied unless impacts on instream flows can be offset.

¹ This is also true in basins not subject to closure.

Groundwater: The decision process is the same as prior to the rule. Groundwater applications in hydraulic continuity with the Skagit River would still be subject to the instream flows unless they are eligible for the domestic reservation. Applications for new consumptive ground water rights from closed sources would be denied, unless the applicant proposes, and Ecology accepts, mitigation of the water use or the applicant shows that the withdrawals will not affect surface water. If the basin is closed for an entire year mitigation is possible but not generally practical. A use may be approved if it is “clear that overriding considerations of the public interest will be served.” (RCW 90.54.020(3)(a)) For areas currently administratively closed under Ecology’s SWSL list, this would represent no change from the current situation. However, for areas that are not currently closed, this may represent a change because applications for new ground water rights would be likely denied by Ecology unless impacts could be completely mitigated.

In the amended rule, based on the hydrogeology of the basin, and the location and depth where groundwater withdrawals generally occur, future groundwater withdrawals have a high likelihood of capturing water that would result in impacts to surface water flows and levels in the Skagit River Basin. The rule does not create the need for, and does not change the standards for, the analysis regarding whether these impacts cause impairment. This may result on an impact to future users of new wells in the basin. For example, in basins not subject to closures, businesses that initiate new agricultural, commercial, or manufacturing projects relying on wells for process water will be required to suspend water use during periods of low flows, develop storage mechanisms or to develop mitigation strategies acceptable to Ecology that allow them to mitigate their impacts. This is the case under the current rule and does not represent an impact of the rule amendment. Businesses in closed basins will be required to mitigate their impacts.

Permit Exempt Groundwater: A reservation of ground water for future domestic uses provides a management framework for these types of withdrawals. One significant factor influencing the impacts of the rule is whether the local governments implement an administrative action or ordinance to effectuate the reservation. If an administrative action or an ordinance is not put in place, the reservation will not be available to new uses until such time as these actions are taken. The analysis below assumes the local governments act to make the reservations available within their jurisdictions. Appendix C discusses the case where action is not taken.

For businesses interested in using an exempt well, there would be several alternatives. Applicants could solicit a hydrogeologist to certify that a well would not cause impairment of a water right in areas where hydraulic continuity between the surface water and groundwater is not likely. This would allow an applicant to develop a well as though the rule was not in place, but at the additional cost of the analysis. For some wells in basins that drain groundwater to saltwater bodies, this cost would likely be very small and is the currently the case. For wells that would be drilled in areas where they are likely to be in hydraulic continuity with closed basins or streams with instream flows, and impairment would result, options include obtaining water from the reservation or accepting an interruptible water right with corresponding curtailment or with storage.

The reservation requires that an applicant be located more than 500 feet from an existing water system. If an applicant is closer to the water system than this, they will be required to connect to the system when the connection can be made in a timely and reasonable manner. This may result in increased costs, including connection charges, construction charges and monthly water rates.

Changes or Transfers of Water Rights: Existing water rights will continue to be changed or transferred as permitted by Chapters 90.03 and 90.44 RCW and the process is the same as before the proposed rule amendment. Changes for surface water rights are still evaluated considering the instream flow right. Requirements related to changes in the point of diversion from a surface point to a ground water point, if it is from the same water source, is the same in the existing rule and the proposed rule amendment. Transfers that are restricted because they are not in the same source will also be treated the same after the rule amendment as under the existing rule. Transfers of water rights may become part of mitigation strategies used by businesses to offset their new water needs.

Reservations of water: The reservations of water, use of water under the reservations, and associated conditions for that use, are all part of the rule proposal. In large measure, the domestic reservation will allow residential and some business development to continue as before with the benefit of having a continuous, reliable source of water during low flow periods, except for a few restrictions. These restrictions include a limit on outside lawn watering, a requirement to connect to public water systems under certain circumstances, and the finite quantity of the reservation. Domestic water use must also meet efficiency standards and outdoor uses will be limited.

Closures of Water Sources in WRIA 3&4: The rule would include the current limitations and administrative closures for surface water sources, and add to them for applicants who cannot access the reservations. Ecology anticipates that applications for consumptive uses from closed sources will be denied unless the applicant can acceptably mitigate for the impacts (the same as prior to adoption of the rule) or take advantage of the reservation.

IMPACTS TO BUSINESSES IN WRIA 3 AND 4

Several potentially significant impacts to businesses in WRIA 3 and 4 are likely and are described below:

1. Closures in subbasins: Some subbasins that are currently open to new interruptible withdrawals will be closed. For other than domestic uses (human needs of a household or business) and stockwatering authorized under the reservations, this requirement will generally eliminate new water withdrawals. New withdrawals may still be available when non-consumptive, fully mitigated, or from groundwater shown to not affect surface water. In these areas, water uses not eligible for the reservation will be required to obtain water from an existing water purveyor, through leases or transfers or through other methods. Domestic uses will be allowed in these closed areas through the proposed reservation but only for human needs.² For those businesses that require water for irrigation or for

² Currently, permit-exempt well users can use up to 5,000 GPD during all periods except low flow periods assuming they meet the other requirements of chapter 90.44 RCW.

agricultural/industrial processes, this might be an impact on future withdrawals since the closure will result in continual mitigation, not just during low flow periods as was the case under the previous rule. This could require water leasing or transfers of existing water rights or could lead to a change in the proposed location of a commercial industry or agricultural use. The magnitude of the impact will be determined by the proposed location and use of future water permit applicants. For those businesses that need water for toilets, washrooms, etc., the establishment of the reservation should be a benefit (see below). The East Fork Nookachamps basin will be opened to a limited amount of new water use. This may be a net benefit to some water users.

2. Creation of the reservations: Currently any groundwater withdrawal, including those via exempt wells in continuity with the Skagit River or its tributaries, is legally required to curtail use during low flow periods. Under the reservation, the future domestic needs of some businesses could be met even during low flow periods. However, only domestic uses will be allowed year around. For businesses that would typically use a relatively small amount of process water (up to 5,000 GPD), an interruptible right could still be available in an open basin, and domestic needs of the business could be met from the reservation. This process water use would not be allowed in a closed basin. For businesses developing land for residential construction or needing domestic water only, the ability to use water during low flows should be a net benefit from this rulemaking.

The creation of the stockwatering reservation will likely provide year-around access to water for new stockwatering uses, except for feedlots and other activities which are not related to normal grazing uses. Currently, water accessed via permitted or permit-exempt wells are legally required to curtail use during low flows. The change in the rule should be a net benefit to stock-related businesses.

3. Connection requirements: Applicants within a public water system service area who desire water from the reservation or an interruptible water right will be required to connect to a public water system if connection is timely and reasonable. In general, this will impact those desiring to use water for domestic needs. However, current users that would use a permit exempt well are legally required to curtail use during low flows. It is unlikely most businesses would consider the current water supply condition to be a sufficient water source and so they would likely have been required to have back-up storage or mitigate in some other way as a consequence of instream flows. As such, this connection requirement is unlikely to impact many businesses. Moreover, the Skagit County Critical Areas Ordinance requires connections under specific conditions. An exception might be a business that doesn't require water during low flow periods, but this is likely to be a small subset of future businesses in the watershed.

4. Impacts to businesses depending on instream flows

As mentioned above, a reservation is to be created from which those seeking a domestic water source and meeting the requirements will be able to obtain water in the future. Accessing the reservation will allow entities to use water for domestic purposes during low flow periods. This will slightly reduce the amount of water in the river during these low flow periods and could potentially indirectly impact instream benefits such as ecosystem services, recreation, etc. Offsetting this will be reduced future withdrawals in

closed basins. For businesses that provide guide services such as rafting, fishing and bird watching, or those dependent on dilution for waste removal, there could be a very minor impact. Discussions with firms that use the river indicate little, if any, impact from the proposed flow reduction from the reservation.

COST TO FIRMS AND REQUIRED PROFESSIONAL SERVICES

Some costs are required of firms required to comply. The following cost and professional services analysis (as required in RCW 19.85) is provided:

Reporting and Recordkeeping: No additional reporting or recordkeeping required.

Additional Professional Services: Closures in basins may lead some to transfer water rights or lease from others. This will likely require increased use of professionals including hydrogeologists, biologists, engineers, and attorneys. The exact requirements would depend on the basin, change, etc. Other mitigation options might involve construction of storage tanks and associated piping requiring engineering design services. Some may save the costs associated with these services if access to the reservation allows them to avoid these requirements. Anyone required to connect to a public water system would likely require additional engineering design and surveying.

Costs of Equipment, Supplies, Labor, and Increased Administrative Costs: Increased equipment associated with pipeline and tank construction may be required for mitigation options but is included in the descriptions below. Some may save these same costs if they can make use of the uninterruptible reservations.

Other Compliance Requirements:

Basin closures will impact those that would have applied for an interruptible water right. In general, it is difficult to determine the cost impact of this requirement since it depends on the number of surface water withdrawals or wells proposed to be installed in the closed basins, required quantity of water, and options and prices for purchase or leases of existing rights. For businesses that require water for location specific activities, this might change the highest-valued use of the land. Water users in these locations are already required to curtail use during low flow periods making irrigation difficult without transfers of uninterruptible rights or the expense of supplemental storage. Evaluation of past permitted uses by businesses indicates that the predominant uses are for multiple domestic systems and irrigation.³ In these areas, domestic uses can still be served by individual wells through the reservation. Future irrigation uses would likely not be impacted too much under the proposed rule amendments since permits under the existing rule would already be interruptible during what is likely the most important irrigation periods. The rule will simply preclude use during the other periods when irrigation water is not as valuable.

Creation of the reservation should be a net benefit for most businesses that need water for human domestic needs. Water that is not available during low flow periods is damaging

³ Since 1985, Ecology annually issues approximately 2 permits to business entities with the majority of those issued prior to 1992. All but one permit was issued prior to the existing rule.

to any business that needs it for its own use or are looking to develop residential properties. In order to have water available during low flow periods under the existing rule, water would have to be obtained through leases, transfers or on-site storage. On-site storage for a low flow period can cost approximately \$25,000-\$30,000⁴ and the proposed rule amendments will allow this cost to be avoided for those that utilize the domestic use reservation. The stockwatering reservation could yield the same avoided cost.

Connection requirements could be a cost to some businesses. However, as mentioned previously, most businesses that require reliable water supply for domestic uses are likely to already connect, have a well and on-site storage or obtain water in other ways. The cost of connection to an existing system can range from \$8,000 to \$35,000 depending on the complexity. However, some of that cost (all, in some cases) will likely be returned via latecomer agreements. A well with storage can easily cost \$40,000 to \$50,000 depending on the depth of the well, geology and tank type making connecting to the system the less expensive alternative.

For those that do not require water for domestic needs during low flow periods, an interruptible right in open subbasins remains an option under both the current and proposed rule. In closed subbasins, where interruptible rights would not be available under the proposed rule, a reservation may provide for domestic needs. For those requiring more than domestic uses in closed basins, purchase or lease of existing water, construction of a deep well or another option would be required.

2. REVENUE IMPACTS AND DISTRIBUTION OF COSTS

INTRODUCTION

RCW 19.85.040 requires that additional analysis of impacts be provided. Specifically, the analysis should include whether compliance with this rule will cause businesses to lose sales or revenue and whether the proposed rule will have a disproportionate impact on small business. It is the purpose of this section to evaluate the proposed rules to consider these requirements.

REVENUE IMPACTS

As noted previously, some firms could experience an increased cost associated with this rule. For those businesses located in subbasins closed by the rule, the cost of obtaining future water in another way may be an impact. Those with existing water rights will not be impacted by these closures. Those required to connect to water systems to obtain new or additional water could also experience an increased cost although this is likely to be a limited number of entities since connection may already be the preferred alternative. To the extent that increased costs yield increased prices for firms, gross revenues could be reduced. Offsetting this is the net benefit to firms that will now be able to get water during periods of low flows via the reservation and avoid expensive on-site storage or other mitigation alternatives. This will likely lower costs to some potential water users and to that extent, may increase revenues.

⁴ Cost assumes two-15,000 gallon underground potable-water rated tanks.

DISTRIBUTION OF COMPLIANCE COSTS

The distribution of compliance costs can be analyzed by evaluating previous water right permits and existing business-owned developable parcels. In the past, permitted business water uses have been predominately small firms as defined by chapter 19.85 RCW.⁵

However, all permits issued previously except one were issued prior to the existing instream flow rule. Permitted uses must now restrict use or mitigate during low flow periods making them relatively less desirable than before the existing rule was put in place. Therefore the historical rate of permits may overstate the expected number of future permits. However, it is reasonable to anticipate that a majority of future applications will also be from small firms.⁶ The reservation will yield a net benefit to any business-owned parcels in the watershed since on-site storage will no longer have to be provided. The exact amount will depend on the size of parcels, ownership, firm size and zoning and yields the distribution of costs in Table 2.1.

Table 2.1. Distribution of Compliance Benefits (Avoided Costs) for Business-Owned Exempt Well Development⁷

	Number of Firms⁸	Average Employment (No. of Employees)	Average Benefit per Employee⁹ (\$1000)	Median Benefit Per Employee (\$1000)
Small Firms	45	6-15	497.0	55.5
Large Firms	12	273-699	16.4	16.4

The numbers in Table 2.1 represent the average avoided storage costs (net benefits) for small and large firms. As can be seen the median avoided cost for small firms exceeds that for large firms by a factor of 3.4. It is important to note that the large avoided costs is based the assumption of full development of all parcels. If a firm (small or large) developed only a portion of their parcels, then the avoided cost would be smaller. Regardless, the data suggests that the impacts of the proposed rule will be disproportionately beneficial to small businesses.

CONCLUSIONS

Some firms located in closed subbasins may experience a cost impact from the proposed rule and this will likely be disproportionately borne by small firms given the past history of water rights issued predominately to small firms. However, all firms of all sizes that elect to use the reservation are likely to experience a negative cost (net benefit) from the rule and it appears the benefit will disproportionately benefit small businesses.

⁵ Since 1985, approximately 37 permits have been issued to businesses or private owners for irrigation. Of those permits only two have been for large firms.

⁶ As noted previously, no cost is provided due to the situation specific nature of permitted water uses.

⁷ Costs assume full development of all business-owned developable parcels.

⁸ The total number of firms represents all businesses located in the county listed as owner of the parcel and where Employment Security data could be located.

⁹ Cost comparisons use the largest 10% of firms required to comply.

3. ACTIONS TAKEN TO REDUCE THE IMPACT ON SMALL BUSINESS

In its pending Superior Court challenge to the current rule, Skagit County alleges that Ecology should have conducted a Small Business Economic Impact Statement when proposing instream flows for the Skagit River. Ecology continues to dispute this assertion. Regardless, in an exercise of caution, and in an attempt to minimize the issues that may arise if this rule-making is challenged, Ecology, in evaluating the instream flow impacts as part of this SBEIS examination finds reason to believe that the impacts on small businesses might have been disproportionate in the current rule. The exact impact is difficult to determine, but based on preliminary analyses in other basins and what is known about the existing rule, it appears likely that, in hindsight, the existing rule had disproportionate impacts on small businesses that should be addressed in this rulemaking. These potential impacts are mitigated to some extent by the proposed amendments. In general, the disproportionate benefits for exempt well development found in Table 2.1 would simply be considered the costs of the existing rule to exempt well development since the rule created the need for storage or other mitigation alternatives evaluated previously. The estimated impacts of instream flow requirements on permit exempt uses in WRIA 3 and 4 would be as provided in Table 3.1.

Table 3.1. Distribution of Compliance Costs for Business-Owned Exempt Well Development for the Existing Rule (WAC 173-503)

	Number of Firms¹⁰	Average Employment (No. of Employees)	Average Cost per Employee¹¹ (\$1000)	Median Cost Per Employee (\$1000)
Small Firms	45	6-15	(\$497.0)	(\$55.5)
Large Firms	12	273-699	(16.4)	(\$16.4)

As can be seen in Table 2.1, it appears likely that most businesses will benefit from the proposed rule and that small businesses will benefit disproportionately. There are no additional recordkeeping or reporting requirements or inspections and compliance timetables and fine schedules are not altered by the proposed rule amendment.

4. HOW WAS SMALL BUSINESS INVOLVED IN THE DEVELOPMENT OF THIS RULE?

The proposed rule has been developed relatively quickly under a court order and is based on conversations during the past two years with governmental and tribal stakeholders. After the filing of the CR-102, official public hearings will be held to consider the rule and allowing small businesses to provide additional input.

5. LIST OF INDUSTRIES REQUIRED TO COMPLY

No industries are required to comply with the proposed rule amendment unless they seek to obtain new water rights in the covered area. However, requirements affecting water

¹⁰ The total number of firms represents all businesses located in the county listed as owner of the parcel and where Employment Security data could be located.

¹¹ Cost comparisons use the largest 10% of firms required to comply.

use are likely to translate into changes in property values based on impacts to the highest valued uses in the watershed. As such, existing business owners of undeveloped property are likely to be the industries that will be required to “comply” either directly in terms of attempting to acquire water or indirectly in terms of changes in asset values. Therefore, the following list is provided indicating Standard Industrial Codes (SIC) codes for existing developable properties in the Skagit watershed.¹²

Table 5.1. Industries Likely Required to Comply with the Rule

SIC Code	Description	SIC Code	Description
0181	Ornamental Nursery Products	5143	Dairy Products, nec. dried or canned
0191	General Farms, Primarily Crop	5148	Fresh fruits and vegetables
0241	Dairy Farms	5154	Livestock
0652	Unassigned	5172	Petroleum products, nec
0783	Ornamental Shrub and Tree Services	5191	Farm supplies
1521	Single-family housing construction	5193	Flowers & florists' supplies
1611	Highway and Street Construction	5221	Unassigned
1794	Excavation work	5261	Retail nurseries and garden stores
2011	Meat packing plants	5271	Mobile Home Dealers
2015	Poultry Slaughtering & Processing	5399	Misc. general merchandise stores
2411	Logging	5431	Fruit and vegetable markets
2421	Sawmills and planing mills, general	5499	Miscellaneous food stores
2441	Nailed Wood Boxes and Shook	5541	Gasoline service stations
2653	Corrugated and solid fiber boxes	5941	Sporting goods and bicycle shops
2951	Asphalt Paving Mixtures and Blocks	6021	National commercial banks
4011	Railroads, line-haul operating	6162	Mortgage banks and correspondents
4213	Trucking, Exceptional	6515	Mobile home site operators
4222	Refrigerated Warehousing and Storage	6531	Real estate agents and managers
4225	General Warehousing and Storage	6552	Subdividers and developers, nec
4492	Towing and Tugboat Service	6792	Oil royalty traders
4812	Radiotelephone Communications	7032	Sporting and recreational camps
4899	Communication Services, nec	7033	Trailer parks and campsites
4924	Natural Gas Distribution	7992	Public golf courses
4925	Mixed, manufactured or liquefied petroleum gas production	7999	Amusement and recreation, nec
4941	Water supply	8322	Individual and family services
5031	Lumber, plywood, and millwork	8641	Civic and social organizations
5032	Brick, stone and related materials	8661	Religious organizations
5099	Durable goods, nec		

Note: Due to size limitations relating to the filing of documents with the Code Reviser, the SBEIS does not contain the appendices that further explain Ecology's analysis. Additionally, it does not contain the raw data used in this analysis, or all of Ecology's analysis of this data. However, this information is being placed in the rule-making file, and is available upon request.

¹² The table was constructed based on data provided by the Skagit County Assessor and by the Washington State Employment Security Department.

APPENDIX A-REFERENCES

1. RS Means, Building Construction Cost Data, 55th Annual Edition, 1997
2. Skagit County v. Washington State Department of Ecology, Petition for Declaratory and Injunctive Relief, Thurston County, Washington
3. Washington State Department of Ecology, Evaluation of Probable Benefits and Costs, Chapter 173-503 WAC, Instream Resources Protection Program Lower and Upper Skagit Water Resources Inventory Area (WRIA 3 and 4), March, 2001

APPENDIX B-RULE ANALYSIS

INTRODUCTION

Ecology anticipates that a significant portion of the proposed rule's implementation will be related to water rights and water management. Water rights and water management are governed by a series of statutes and court cases. Compliance with the rule will occur primarily within the context of complying with state water laws. Evaluating the impacts of the proposed rule amendment involves describing the baseline from which the change caused by the rule is measured. The baseline includes water right administration for both new and changes of water right applications under chapters 90.03 and 90.44 RCW, existing WAC 173-503 and case law. It also includes the use and development of water by permit exempt wells pursuant to RCW 90.44.050. For the consideration of instream values, chapter 77.55 RCW and current implementation of chapter 90.22 and 90.54 RCW as they relate to water rights and water management is also part of the baseline.

In proposing the creation of the reservations of water, the amendment creates a mechanism that allows for future uninterrupted domestic water uses and stockwatering. In the case of the stream closures, the proposed rule's effect will likely be on future determinations of water availability. Consideration of water availability is part of the water right application process. The four-part test for a water right from RCW 90.03.290 remains unchanged and includes examination of water availability. The proposed rule will quantify water availability for some uses through the reservation and establish new water rights for this watershed. Conditions may be imposed on a future water right to implement the rule. How the proposed rule changes consideration of requests for new water and or changes to water rights and in particular how environmental values are reflected in the decisions prior to and after the rule amendment are described below.

BASELINE DEVELOPMENT

Under State water law, the waters of Washington collectively belong to the public and cannot be owned by any one individual or group. Proposed diversions or withdrawals of any amount of water for any use from all surface or groundwater sources require a water right be obtained. A water right is a legal authorization to use a certain amount of public water for a designated purpose. A water right is necessary if you plan to divert or withdraw any amount of water for any use from:

- Surface waters (water located above ground) such as lakes, rivers, streams and springs.
- Ground waters (water located under ground).

Although all uses require a water right, certain groundwater withdrawals are exempt from permitting requirements. An application for a ground water right permit is not required if your daily ground water use from a well or wells will be 5,000 gallons a day or less for any of the following combinations of uses:¹³

- Drinking and cleaning water for livestock (stock-watering).
- Single or group domestic purposes such as drinking, cooking and washing.

¹³ Publication #F-WR-92-104.

- Industrial purposes.
- Watering a lawn or noncommercial garden that is a half acre or less in size.

Although the law allows an exemption from the water right permit process in these cases, all other water laws and regulations still apply to these uses.

Washington water law requires users of public water to receive approval from the state prior to the actual use of water. Approval to put water to beneficial use is granted in the form of a water right permit. The proposed use must meet four primary requirements (known as the “four-part test”) in order for Ecology to issue a water right permit:

1. The water will be put to beneficial use;
2. There will be no impairment to existing rights;
3. Water is available; and
4. The water use will not be detrimental to public welfare.

Ecology conducts an investigation of the application to confirm the information on the application and applies the four-part test mentioned above. In applying this four-part test, some of the facts Ecology considers are based on the particular water source, existing water rights, and watershed. These include the instream flow recommendations made in the past, instream flow rules (if they exist) and whether and how groundwater is connected to surface water sources. The results of the investigation and four-part test review are summarized in a report of examination (ROE). The ROE contains Ecology's staff-level decision on a water right request. Ecology can recommend a denial, an approval, or an approval with conditions. Once approved by an Ecology decision-maker, Ecology issues a final ROE and orders approving the ROE. If approved, the permit will likely have specific conditions.

Instream flow considerations within water right application administration has been the law since 1949 (See RCW 77.55.050). Generally, a flow of water sufficient to support game fish and food fish populations must be maintained at all times in the streams of this state. Under that statute, Ecology sends copies of water right applications to the Washington Department of Fish and Wildlife (WDFW) to see if approving the proposed withdrawal would compromise game and food fish populations. In 1969, by adoption of Chapter 90.22 RCW (Minimum Water Flows and Levels) and again in 1971, by adoption of the Water Resources Act, the Legislature added additional policies for instream flow considerations and the instream flow rule program. Instream flows once adopted by rule are water rights protected from impairment from those rights junior in priority date to the instream flows (RCW 90.03.345). Ecology is prohibited, by statute, from allowing withdrawals of water that conflict with an instream flow regulation, unless there is a clear showing of overriding consideration of public interest (RCW 90.54.020(3)(a)). Numerous water sources in WRIA 3 & 4 are listed on Ecology's Surface Water Source Limitation List (SWSL) based on past comments of resource agencies pursuant to RCW 77.55.050.

The consideration of a proposed withdrawal's impact on fisheries resources and flow is performed by professional fisheries biologists based on professional judgment using the

existing data and/or knowledge of the basin. If there is concern that approval of use might compromise instream values, an application can either be denied or approved with use conditioned on minimum flow levels. A junior water right must stop use, if a senior right is not satisfied. Consequently, rights conditioned upon minimum flow levels are interruptible water rights that must be discontinued during times when streamflows are below the established flow value

In the case of the Skagit River, there is an existing in-stream flow rule in place and water is currently allocated according to existing water law. The current water management program can be broken down as follows:

Surface Water Allocations (water right permit)

New applications for surface water rights are forwarded to the WDFW for review and comment. The four-part test is applied. If there is a concern that water uses might adversely impact fish, WDFW will recommend that the right not be issued or that any use granted be conditioned on minimum flows. In most cases Ecology will accept WDFW's recommendation and condition the right in such a way that flows are protected. Surface water allocations are also subject to interruption under Chapter 173-505 WAC. A permit is approved granting an interruptible right.

Groundwater Allocations (water right permit)

New applications for ground water rights are, generally, subject to the same requirements as for surface water rights. All applications are reviewed by WDFW. The four-part test is applied. If there is a concern that water uses might adversely impact fish, for example due to hydraulic continuity, WDFW will recommend that the right not be issued or that any use granted be conditioned on minimum flows. In most cases, Ecology will accept WDFW's recommendation and condition the right in such a way that flows are protected. The impact of a ground water withdrawal on a surface water body (stream or lake) through hydraulic continuity is generally estimated based on aquifer characteristics and accepted hydrogeologic study methods.

Historically few approved ground water uses were issued interruptible with a condition on instream flows. After the 1980's that practice changed. The science of ground water development and tools for assessing ground water flow became more advanced. Moreover, Ecology's understanding of the law on ground water hydraulic continuity was shaped, in part, by the Supreme Court's decision in *Postema v. Ecology* (2000). Now a ground water development's impact to existing wells and surface water sources is evaluated within the impairment analysis.

Groundwater Allocations (permit exempt)

New ground water can be obtained from permit-exempt wells under specific conditions (RCW 90. 44.050). The groundwater permit exemption is an exemption from a water right permit application; all other water laws and regulations still apply. Currently, the local health district and building permit officials determine when permit exempt wells can be used. In general, there are few restrictions on location except for sanitary setbacks.

As a water right, use of a permit exempt well can be regulated in favor of senior rights if it impairs an existing right, including instream flows. Historically, Ecology has rarely regulated these water rights to protect senior water rights.

Changes or Transfers of Water Rights (Water Right Permits)

Existing water rights can be changed or transferred pursuant to chapters 90.03 and 90.44 RCW.

Reservations of water

There are no existing reservations of water within WRIA 3 & 4.

Closures of water sources in WRIA 3 & 4

There are currently a few streams closed to future appropriations in WRIA 3 & 4 based on Ecology's SWSL list. Closures are based on a finding of no water availability, generally because the available supply has been fully allocated.

RULE IMPACTS TO WATER RIGHT ADMINISTRATION

The future water right management program under the proposed rule can be broken down as follows:

Surface Water Allocations (water right permit)

Before Ecology can approve a water right application for a new public water system, the applicant must provide sufficient documentation that no other public water system can provide water in a timely and reasonable manner. If domestic water can be provided in a reasonable and timely manner by some other public water system, Ecology shall reject the water right application.

New applications for surface water rights will still be forwarded to the WDFW for review and comment and the four-part test will be applied. In cases where the proposed withdrawals may impact instream needs, WDFW will recommend that the right not be issued or that any use granted be conditioned on the existing rule's minimum flows. In most cases Ecology will accept WDFW's recommendation and condition the right in such a way that flows are protected. Surface water allocations are also subject to interruption under Chapter 173-503 WAC.

Under the proposed rule and since the 2001 establishment of instream flows, all new water rights are "junior" to the published instream flow values and be required to stop withdrawals when minimum flows are not met in the surface water source. Applications for new surface water rights from closed sources would be denied, unless the applicant proposed mitigation of the water use or the use was approved subject to overriding considerations of the public interest. For those areas currently closed, this would represent no change from the current situation. For areas that are not currently closed, this may represent a change.

The rule amendment will ensure uniformity and consistency in flow determinations and resultant instream flow provisos.

Groundwater Allocations (water right permits)

Before Ecology can approve a water right application for a new public water system, the applicant must provide sufficient documentation that no other public water system can provide water in a timely and reasonable manner. If domestic water can be provided in a reasonable and timely manner by some other public water system, Ecology shall reject the water right application.

New applications for ground water rights are, generally, subject to the same requirements as for surface water rights. The four-part test is applied. All applications will still be reviewed by WDFW and if there is a concern that water uses might adversely impact fish, WDFW will recommend that the right be so conditioned as to provide for in the instream flow rule. In most cases, Ecology will accept WDFW's recommendation and condition the right in such a way that flows are protected. The impact of a ground water withdrawal on a surface water body (stream or lake) through hydraulic continuity will generally still be estimated based on aquifer characteristics and accepted hydrogeologic study methods. If the proposed appropriation were to capture water, that would otherwise contribute to instream flows, the permit approval would be conditioned as interruptible to protect against impairment of the instream flow right.

Applications for new ground water rights from closed sources would be denied, unless the applicant proposed mitigation of the water use or the use was approved subject to over riding considerations of the public interest. For those areas currently closed, this would represent no change from the current situation. However, for areas that are not currently closed, this may represent a change since new ground water rights would be denied, unless the applicant proposed mitigation of the water use of the use was approved subject to over riding considerations of the public interest.

As mentioned above, groundwater rights are subject to the same requirements as for surface water rights. However, in the past, groundwater rights have not been conditioned due to the difficulty in knowing impacts to surface sources based on the degree of continuity. The proposed amendment clarifies the applicant's responsibility in demonstrating that groundwater extraction will not impair other rights. However, the impact created on the surface water source via hydraulic continuity is not necessarily impairment. A separate statutory requirement exists to analyze the possibility of impairment from withdrawals of ground and surface waters in continuity. This proposed amendment and the existing rule do not affect this statutory requirement.

Groundwater Allocations (permit exempt)

Some portions of the Skagit basin are closed to new ground water development under the proposed rule amendment, with exceptions provided for in the rule. The reservation of permit-exempt ground water for future domestic, small business, and public water supply uses will provide for a management framework for these types of withdrawals. Because access to the reservations requires local governments to take certain steps, one of the most significant factors influencing impacts from the proposed rule is whether the local governments enact an ordinance or other administrative action to effectuate the reservation. If an agreement or ordinance is not put in place by local governments, then no reservation water is available. The analysis below assumes that local governments

complete the required agreement or ordinance. The Appendix discusses the case where no ordinance is promulgated.

If there is no reservation in effect, and certain streams or basins are closed to new appropriation, then no new permit exempt wells would be drilled in those areas. If the reservation is in effect, and water is being used, there are still several water management conditions that may have an impact on water use including restrictions on outdoor use.

For individuals and business entities, there are several alternatives. Applicants may choose as a first order of business to solicit a hydrogeologist to certify that a well would not cause an impairment of a water right in those areas where hydraulic continuity is unlikely. This would allow an applicant to develop a well without the limitations imposed by the existing rule's instream flows and without the limitations imposed by the proposed amendment. However, the applicant would bear the additional cost of the analysis. For some wells in basins that drain groundwater to saltwater bodies, the cost for hydrogeologic consultation would likely be very small. For those applicants wishing to use water in areas with a likelihood of hydraulic continuity and consequently, impairment of instream flows, they could get water from the reservation or accept an interruptible water right.

Obtaining water from the reservation requires that an applicant be located more than 500 feet from an existing water system. If an applicant is closer than this, then they will be required to connect to a public water system if the connection can be made available in a timely and reasonable manner. This may result in increased costs including connection charges, construction charges and monthly water rates.

Changes or Transfers of Water Rights

Existing water rights can continue to be changed or transferred pursuant to chapters 90.03 and 90.44 RCW. Changes to surface water rights will include consideration of the instream flow right. Transfers of point of diversion downstream or upstream on a source may be restricted based on in-stream flows from the rule. Changes in point of diversions from a surface point to a ground water point from the same water source will probably not be impacted by the rule. Transfers that are restricted may represent a cost for those that would have preferred to trade water.

Reservations of water

The reservation of water, use of water under the reservation and associated conditions for that use are all new proposals. In large measure, the reservation will allow use of permit-exempt wells without them being subject to the instream flow right. These uses are subject to limitations on outdoor watering. Use of water under the domestic use reservation is conditioned as follows:

- (a) The water reserved shall be for ground water uses exempt from a water right permit application pursuant to RCW 99.44.050.
- (b) The quantities of reserved ground water are set by tributary basin in rule.

(c) Domestic water use shall meet the water use efficiency standards of the uniform plumbing code as well as any applicable local or state requirements for conservation standards.

(d) This reservation shall only be available for use in areas governed by a county ordinance or other administrative action that sets forth the same requirements as subsections a, b, c, e, f and g of the proposed WAC 173-503-073(2) as conditions on a water availability determination based upon the reservation, issued pursuant to RCW 19.27.097 and RCW 58.17.110.

(e) Water use under this reservation is not allowed in those areas where a public water system has been established pursuant to RCW 43.20.260, and where the connection can be provided in a timely and reasonable manner. A “timely and reasonable manner” means potable water service can be provided by a purveyor within 120 days of a written request for service, to a property located within the public water system and 500 feet of the purveyor’s water pipe line.

(f) Outdoor irrigation shall be limited to an area not to exceed a total of 1/12th of an acre and under all circumstances, total outdoor watering for six or more residences under the permit exemption (RCW 90.44.050) shall not exceed ½ acre.

If the proposed rule amendment goes into effect, then use of the permit-exempt well water will now have to be obtained from a reservation if year-around use is desired. Businesses that elect to install permit exempt wells for their own moderate needs or to develop saleable land will face more choices as to their best option. After the rule is amended, the project proponent may choose other methods of water well development (for example drilling to deep aquifers) to meet their needs and avoid limitations imposed by the rule.

The rule amendment also proposes a future stock watering reservation for stock water as directed by RCW 90.22.040. Future stock watering in the proposed rule is accessed via either a diversion structures or wells and relates to normal grazing activities for the surface water use. In addition, RCW 90.44.050 provides an exception to the requirements for a ground water right permit for stockwater. The rule sets a volume limit on this use of water but otherwise does not change the existing situation.

Closures of Water Sources in WRIA 3 & 4

The proposed rule amendment will include most of the current limitations on water withdrawals based upon the SWSL list but also adds to them. Ecology anticipates denying applications from closed sources unless the applicant can mitigate for the impacts. This was true before the proposed rule amendments but after the amendments become effective the areas subject to closure will enlarge.

Maximum Allocation

There is an existing 200 CFS maximum interruptible allocation in the existing rule that is not changed in the rule amendment.

PROPOSED RULE (CHAPTER 173-503 WAC)

The complete rule language for existing instream flows in WRIA 3 and 4 can be found in Chapter 173-503 WAC. The following provides a brief description of the amended rule

and further discussion of those specific rule provisions that may relate to out-of-stream uses of water.

Chapter 173-503-010 General Provisions

The rule applies to all future uses of surface and groundwater within the Skagit water resources inventory area (WRIA 3 and 4) excluding the Samish river subbasin, Fidalgo, Guemes, Cypress, Hope and Goat islands.

Conclusion: No change¹⁴

Chapter 173-503-020 Purpose

The purpose of the proposed rule is to retain perennial rivers, streams and lakes within the Skagit water resources inventory area and Cultus Mountain tributaries with instream flows and levels. The amended section will create a reservation to satisfy human domestic needs and a reservation for stock watering.

Conclusion: No significant economic impact-see “Rule Impacts to Water Right Administration”

Chapter 173-503-025 Definitions

See the proposed rule.

Conclusion: No significant economic impact-see “Rule Impacts to Water Right Administration”

Chapter 173-503-030 Findings

See the proposed rule.

Conclusion: No change

Chapter 173-503-040 Establishment of Instream Flows

This section establishes the locations of the gauges (control points) where instream flows will be measured and establishes stream management reaches.

Conclusion: No change

Chapter 173-503-050 Water Availability Determination

The department has determined that two hundred cubic feet per second are available to be appropriated through groundwater withdrawal or surface water diversion but will be subject to instream flows. This can be revisited depending on the time period.

Conclusion: No change

Chapter 173-503-051 Stream Closures

¹⁴ This conclusion and those that follow are evaluating the change in rule requirements from the existing rule (WAC 173-503) to the proposed rule amendment.

Ecology is proposing closing many of the tributary sub-basins to year around use. This includes surface and groundwater permits and groundwater withdrawals otherwise exempted from permit requirements. Several streams are not closed and will be available for allocation subject to instream flows.

Conclusion: Closure may impact the ability to obtain water in some locations.-see “Rule Impacts to Water Right Administration”

Chapter 173-503-060 Future Permitting Actions

All new applications for domestic water rights from the reservations must show that water is not available in a timely and reasonable manner. Surface and groundwater permits that are not subject to instream flows may be issued if the proposed use is non-consumptive, uses a reservation as its source proposes Ecology approved mitigation. In all cases, it must not impair senior water rights.

Based on the hydrogeology of the basin and location and depth of where groundwater withdrawals generally occur, most of the water in the basin is likely to be in hydraulic continuity with surface water flows and lakes. New consumptive groundwater uses that are in hydraulic continuity with surface water will be subject to instream flows. New consumptive groundwater uses that are not in hydraulic continuity or that will not impair instream flows may be approved without conditioning them on the instream flows in the existing rule. The burden of analysis will be on the applicant to demonstrate that impairment will not occur via a sufficient hydrogeologic analysis.

Permits in open basins may be issued but they will be junior to instream flows. All permitted uses will be required to meter.

Conclusion: Demonstrating lack of continuity or additional mitigation measures are clarifications of existing permit requirements. Meters are currently required for all permitted uses. See “Rule Impacts to Water Right Administration”

Chapter 173-503-070 Exemptions

No existing rights shall be impacted

Conclusion: No change

Chapter 173-503-071 Lakes and Ponds

Lakes and ponds shall be protected and where possible, enhanced.

Conclusion: No significant economic impact -see “Rule Impacts to Water Right Administration”

Chapter 173-503-073 Domestic Ground Water Reservation

The department is proposing setting up a reservation for domestic uses and the human health requirements of small businesses that will be uninterruptible and will require that efficiency standards meet the UPC, and that the county establish an ordinance or other administrative action that indicates the counties will implement the rule and its

conditions. In subbasins that are not being closed, permit-exempt uses that do not use the reservation may be allowed, but will be interruptible as required to maintain senior instream flows. Interruptible ground water withdrawals may not be adequate for all purposes.

Water from the reservation is unavailable to those who can receive water from a local purveyor in a timely and reasonable manner. No outdoor irrigation will be allowed exceeding a total of 1/12th of an acre for individual, residential outdoor uses, with 6 or more residences being limited to ½ acre of outdoor irrigation. Specific accounting criteria will also be set up and the department shall provide notification when the reservation has been consumed and is no longer available.

Conclusion: In most cases, establishment of a reservation will increase the allowed use of water during low flow years and result in a benefit to out of stream uses. In-stream effects may occur. Some proposed uses will not be able to obtain the same quantity of water during other times of the year as they can under the existing rule. See “Rule Impacts to Water Right Administration”

Chapter 173-503-074 Establishment of Subbasin Management Units and Reservation Quantities by Subbasin Management Units

Ecology is proposing to establish subbasin management units. For each subbasin unit, Ecology indicates whether it is closed to new allocations and what amount, if any, is reserved for domestic uses within the subbasin.

Conclusion: Establishing the maximum amount of water could put a cap on development if it is less than required for build-out (see SEPA). Basin closures will eliminate permitted surface and groundwater withdrawals. Potential significant economic impacts-see “Rule Impacts to Water Right Administration”

Chapter 173-503-075 Stock Watering Reservation

Ecology is proposing to reserve 130,000 gallons per day for future stock watering accessed via either diversion structures or wells; the withdrawals must be related to normal grazing activities

Conclusion: The current rule would require water rights obtained for stockwatering to be junior to instream flows. The proposed rule will provide for use during low flow times and should beneficially impact potential users-see “Rule Impacts to Water Right Administration”

Chapter 173-503-080 Policy Statement for Future Permitting Actions

This section has been deleted.

Conclusion: No significant economic impact-see “Rule Impacts to Water Right Administration”

Chapter 173-503-081 Future Changes and Transfers

Transfers will only be allowed if they don't conflict with this chapter

Conclusion: No significant economic impacts-see "Rule Impacts to Water Right Administration"

173-503-090 Compliance and Enforcement

The department will prepare and distribute technical and educational information regarding the chapter. Voluntary compliance is preferred.

Conclusion: Technical and educational materials will be a cost of the proposed rule amendment-see "Rule Impacts to Water Right Administration"

173-503-100 Alternative Sources of Water

The department encourages the use of alternative sources of water.

Conclusion: No significant economic impact-see "Rule Impacts to Water Right Administration"

173-503-110 Establishment of Trust Water Rights Program

A trust water rights program will be established to acquire water rights.

Conclusion: No significant economic impact-see "Rule Impacts to Water Right Administration"

173-503-120 Map

See the proposed rule.

Conclusion: No significant impact-see "Rule Impacts to Water Right Administration"

173-503-130 Appeals

All decisions can be appealed to the pollution control hearings board

Conclusion: No significant economic impact-see "Rule Impacts to Water Right Administration"

173-503-140 Regulation Review

This rule may be reviewed and revised

Conclusion: No significant economic impact--see "Rule Impacts to Water Right Administration"

173-503-150 Water Rights Subject to Instream Flows Predating the Reservation

Water rights commenced prior to the effective date of the reservation may participate in the reservation provided they agree to change their priority date to that of the reservation and comply with the conditions applicable to the reservation.

Conclusion: No significant economic impact-see “Rule Impacts to Water Right Administration”

APPENDIX C: IMPACT IF RESERVATION IS NOT IMPLEMENTED

There is a possibility that even if the rule amendment goes into effect, that the local governments will not enact an ordinance or take other administrative action to make the reservation available within their jurisdiction. If so, then the reservation will not be available within those jurisdictions. As such the business impacts will be as follows:

1. Closing/opening additional subbasins: Some subbasins that are currently open to new interruptible withdrawals will be closed. Closure will eliminate new water withdrawals, unless they are non-consumptive, fully mitigated, or shown to not affect surface water. In closed subbasins, new water uses will be required to obtain water from an existing water purveyor, through leases or transfers or other methods. For those businesses that require water for irrigation or processes, this might be an impact on future withdrawals since they would now be required to mitigate their uses at all times instead of just during low flow periods. This could require water leasing or transfers of existing water rights or could lead to a relocation of a proposed commercial industry or agricultural use. The magnitude of the impact will be determined by the proposed location and use of future water permit holders. The East Fork Nookachamps basin will be opened to a limited amount of new water use. This may be a net benefit to some water users.

2. Impacts to businesses depending on instream flows

There will be reduced future withdrawals in closed basins. For businesses that provide guide services such as rafting, fishing and bird watching, or those dependent on dilution for waste removal, there could be a very minor beneficial impact. Discussions with firms that use the river indicate little, if any, impact from the proposed flow reduction from the reservation.

As noted previously, some firms could experience an increased cost associated with this rule. For those located in subbasins closed by the rule, the cost of obtaining water in another way may be an impact. To the extent that increased costs yield increased prices for firms, gross revenues could be reduced. These costs would only be expected in closed subbasins where the reservation is unavailable. Partially offsetting this is the net benefit to firms that will now be able to get water from the East Fork of the Nookachamps.

The distribution of compliance costs can be analyzed by evaluating previous water right permits. In the past, permitted business water uses have been predominately small firms.¹⁵ It is reasonable to anticipate that a majority of future business-requested permits will also be small firms. For this subset of water users located in the closed subbasins and which are unable to access the reservation due to inaction by local governments the proposed rule would likely be disproportionate.

¹⁵ Since 1985, approximately 37 permits have been issued to businesses or private owners for irrigation. Of those permits only two have been for large firms.